Supreme Court, U.S.
FILED
MAY 29 2002
CLERK

No. 01-1145

In the Supreme Court of the United States

RITH ENERGY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

THOMAS L. SANSONETTI
Assistant Attorney General

WILLIAM B. LAZARUS
JOHN A. BRYSON
KATHERINE J. BARTON
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

Petitioner claims a taking based on the denial of a revision to a federal permit to engage in surface coal mining operations by the Interior Department's Office of Surface Mining Reclamation and Enforcement (OSM). OSM's decision was based on soil tests indicating that most of the mine site had a high probability of producing acid mine drainage and that mining activities consequently posed a danger to groundwater in the vicinity. The questions presented are as follows:

1. Whether the court of appeals erred in analyzing the economic impact of the permit denial against the value of petitioner's mining leases in their entirety, rather than against the portion that had not been mined at the time the permit revision was denied.

2. Whether the court of appeals erred in concluding that petitioner lacked reasonable investment-backed expectations in conducting surface mine operations that had a high probability of producing acid mine drainage.

3. Whether the court of appeals erred in declining to review petitioner's claims that OSM had unlawfully discriminated against petitioner.

4. Whether the court of appeals erred in concluding that OSM's denial of the permit revision did not constitute a compensable taking under the multi-factor test set forth in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	12
Conclusion	18

TABLE OF AUTHORITIES

Cases:

Agins v. *City of Tiburon*, 447 U.S. 255 (1980)	18
Babbitt v. *Youpee*, 519 U.S. 234 (1997)	15
Big Fork Mining Co. v. *Tennessee Water Quality Control Bd.*, 620 S.W.2d 515 (Tenn. Ct. App. 1981)	4
Concrete Pipe & Prods. v. *Construction Laborers Pension Trust*, 508 U.S. 602 (1993)	13
Hodel v. *Irving*, 481 U.S. 704 (1987)	15
Hodel v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981)	2
Keystone Bituminous Coal Ass'n v. *DeBenedictis*, 480 U.S. 470 (1987)	13, 17, 18
Lucas v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992)	8
Palazzolo v. *Rhode Island*, 533 U.S. 606 (2001)	11, 14
Penn Central Transp. Co. v. *New York City*, 438 U.S. 104 (1978)	12, 14, 15, 18
Tahoe-Sierra Pres. Council, Inc. v. *Tahoe Regional Planning Agency*, 122 S. Ct. 1465 (2002)	13, 14

Statutes:

Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.*	2
30 U.S.C. 1201(c)	2
30 U.S.C. 1201(d)	2
30 U.S.C. 1202(a)	2

Statutes—Continued: Page

30 U.S.C. 1202(c) 3
30 U.S.C. 1211 (1994 & Supp. V 1999) 2
30 U.S.C. 1254 2
30 U.S.C. 1256 2
30 U.S.C. 1257(b)(11) 2
30 U.S.C. 1258(a)(13) 3
30 U.S.C. 1260(b)(2)-(3) 3
30 U.S.C. 1260(b)(3) 3
30 U.S.C. 1265(b)(10) 3
30 U.S.C. 1265(b)(10)(A) 3
30 U.S.C. 1271(a)(2) 4
Tennessee Water Quality Control Act of 1977, Tenn. Code Ann., 69-3-102 to 69-3-131 (1995) 8

Miscellaneous:

49 Fed. Reg. (1984):
p. 15,496 5
p. 38,874 5

In the Supreme Court of the United States

No. 01-1145

RITH ENERGY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 11a-27a) is reported at 247 F.3d 1355. The opinion of the court of appeals denying the petition for rehearing (Pet. App. 1a-10a) is reported at 270 F.3d 1347. The opinion of the Court of Federal Claims (Pet. App. 30a-45a) is reported at 44 Fed. Cl. 108. The opinion of the Court of Federal Claims denying the motion for reconsideration (Pet. App. 28a-29a) is reported at 44 Fed. Cl. 366.

JURISDICTION

The judgment of the court of appeals was entered on May 2, 2001. A petition for rehearing was denied on November 5, 2001 (Pet. App. 134a). The petition for a writ of certiorari was filed on February 4, 2002 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. 1201 *et seq.*, serves, *inter alia*, to "establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." 30 U.S.C. 1202(a). In enacting SMCRA, Congress found that coal mining may adversely affect the public welfare in numerous ways, including "by polluting the water." 30 U.S.C. 1201(c). Congress concluded that those potential adverse effects created an "urgent" need to "minimize damage to the environment * * * and to protect the health and safety of the public." 30 U.S.C. 1201(d).

To achieve its goals, the Act relies on "a program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981). If a State covered by the Act fails to propose or implement a satisfactory program, the Act requires the Secretary of the Interior to promulgate and implement a federal regulatory program for that State. 30 U.S.C. 1254. Within the federal government, implementation of SMCRA is entrusted to the Office of Surface Mining Reclamation and Enforcement (OSM), an agency located within the Department of the Interior. 30 U.S.C. 1211 (1994 & Supp. V 1999).

SMCRA requires coal mine operators to obtain permits before conducting any surface coal mining operations. 30 U.S.C. 1256. A permit applicant must, *inter alia*, submit information adequate to determine the "probable hydrologic consequences" of mining on surface and groundwater systems. 30 U.S.C. 1257(b)(11).

OSM uses that information to prepare an "assessment of the probable cumulative impact" that evaluates the effect of the proposed operation in conjunction with other mining operations to project the total impact on the hydrology of the area. 30 U.S.C. 1260(b)(3). A permit must also demonstrate how the mining operation will meet certain performance standards, which include the obligation to "minimize the disturbances to * * * the quality and quantity of water in surface and ground water systems." 30 U.S.C. 1265(b)(10).

A permit applicant must also submit a reclamation plan that specifies the measures to be taken "to assure the protection of * * * the quality of surface and ground water systems, both on- and off-site, from adverse effects of the mining and reclamation process." 30 U.S.C. 1258(a)(13). SMCRA prohibits OSM from approving any mining permit unless the application "affirmatively demonstrates" that reclamation as required under SMCRA can be accomplished and that the operation "has been designed to prevent material damage to [the] hydrologic balance outside [the] permit area." 30 U.S.C. 1260(b)(2)-(3), 1265(b)(10)(A). OSM must "assure that surface coal mining operations are not conducted where reclamation as required by this [Act] is not feasible." 30 U.S.C. 1202(c).

In the event that an existing mining operation threatens to endanger the public health and safety or to harm the environment, the Act directs the Secretary of the Interior to order the immediate cessation of such operation:

> When, on the basis of any Federal inspection, the Secretary or his authorized representative determines that any condition or practices exist, or that any permittee is in violation of any requirement of

> this [Act] or any permit condition required by this [Act], which condition, practice or violation also creates an *imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources*, the Secretary or his authorized representative shall immediately order a cessation of surface coal mining and reclamation operations or the portion thereof relevant to the condition, practice, or violation.

30 U.S.C. 1271(a)(2) (emphasis added).

2. Acid mine drainage occurs when certain types of soil and rock material disturbed during mining are exposed to air and water. Pet. App. 14a, 33a n.3. Acid mine drainage may take several years to develop, but once it occurs, it is usually produced continuously and may continue to flow for many years after mining has ceased. *Ibid.* Acid mine drainage degrades surface water quality, destroys aquatic life, and clouds water and coats the sides and bottom of water bodies, destroying a stream's aesthetic qualities and preventing the growth of aquatic life. *Id.* at 34a n.3; see *Big Fork Mining Co.* v. *Tennessee Water Quality Control Bd.*, 620 S.W.2d 515, 522-523 (Tenn. Ct. App. 1981). Acid mine drainage also impairs the quality of groundwater for drinking and domestic use. Pet. App. 34a n.3.

In June 1985, petitioner acquired coal mining leases covering approximately 250 acres in the Cumberland Plateau region of Tennessee. Pet. App. 14a-15a. Petitioner proposed to remove coal from two coal seams, the Sewanee and the Richland. *Id.* at 15a. At the time petitioner acquired its leases, extensive evidence showed that mines in the vicinity, particularly those associated with the Sewanee seam, had caused acid

mine drainage. *Id.* at 15a, 32a-33a. Petitioner's mine site drains into McGill Creek, which already has been materially damaged by acid mine drainage, C.A. App. 222-223, 396, 400-401, 442, 526-532, and Crystal Creek, which is relatively unaffected by acid mine drainage and supports game and non-game fisheries and recreational use, *id.* at 160c, 405, 442-443. In addition, the Sewanee coal seam is located above an aquifer that furnishes drinking water to area residents. Pet. App. 15a.

3. Petitioner acquired the two mineral leases at issue in this case for a total of approximately $33,500. Pet App. 15a. Each lease warned of the uncertainties of being able to mine. *Ibid.* One lease provided that in case of "force majeure," including the "inability to obtain necessary permits or licenses," all obligations under the lease would terminate. C.A. App. 83. The other lease disclaimed any warranties as to the quantity, quality, or capability of removal of the coal, stating that this was a "business risk which is assumed by [the lessee]." *Id.* at 90.

Approximately a year before petitioner acquired its leases, implementation and enforcement of SMCRA in Tennessee was transferred from the State to OSM, due to Tennessee's failure adequately to enforce its state program. Pet. App. 14a-15a; see 49 Fed. Reg. 15,496 (1984); *id* at 38,874. In August 1985, petitioner applied to OSM for a permit to conduct surface coal mining operations on 89 of its 250 lease acres. Pet. App. 15a, 33a. With its application, petitioner submitted to OSM the results of soil testing, which showed the soil "overburden" (the soils lying above the coal deposits) to be of low acidity and the surrounding soils to possess buffering capabilities. *Id.* at 15a, 33a-34a. Those test results suggested that petitioner's proposed mining

activities presented little risk of acid mine drainage. *Ibid.* Based on those tests, OSM determined that petitioner's proposed mine operations would comply with SMCRA, and the agency issued petitioner a permit to mine. *Id.* at 15a, 35a. Petitioner began mining immediately thereafter. *Id.* at 35a.

Shortly after petitioner's mining activities commenced, OSM was prompted by citizen complaints and soil testing it had conducted in a nearby, geologically similar watershed to conduct its own testing of petitioner's site. Pet. App. 15a, 35a. On March 25, 1986, OSM visited petitioner's site and took a sample from an exposed highwall. *Ibid.* OSM's test results showed the presence of a thick zone of acidic material in the shale overburden of the Sewanee coal seam. *Id.* at 15a-16a. The overburden was 250% more acidic than had been indicated by the test results that petitioner had previously submitted, and the potential neutralization ability of the soil was nearly zero, a 500% difference from the previously reported data. *Id.* at 16a, 35a. In addition, a zone of pyritic shale below the Sewanee coal seam also had high potential acidity. *Id.* at 67a. Based on those new findings, OSM directed petitioner to provide additional soil samples, which confirmed OSM's prior testing. *Id.* at 16a. The chief of OSM's Southern Operation testified in subsequent proceedings that petitioner's mine site contained one of the highest levels of acid material that he had ever seen. *Id.* at 24a, 80a. OSM believed that the high acid-producing potential of the overburden posed a threat to the hydrologic balance outside the permit area, including underlying groundwater. *Id.* at 83a. OSM concluded that there was a "very high probability" that the material would produce acid mine drainage. *Id.* at 82a.

4. On June 27, 1986, OSM suspended petitioner's permit to mine the Sewanee seam, explaining that petitioner's soil sample data were not representative of site conditions and that the existing mining plan was not designed to accommodate the highly acidic material on petitioner's mine site. Pet. App. 16a, 35a, 67a. OSM invited petitioner to submit a plan for handling the toxic material at the mine site. *Ibid.* While petitioner attempted to develop a toxic materials handling plan, OSM permitted it to continue to mine those portions of the site where the Richland coal seam could be accessed without disturbing the toxic soils located above and below the Sewanee seam. *Id.* at 16a, 35a-36a. Petitioner operated the mine for more than a year, producing approximately 35,700 tons of coal and earning a net profit of approximately $500,000. *Id.* at 16a, 20a, 36a n.4. Petitioner ultimately failed, however, to develop a toxic materials handling plan that was acceptable to OSM. *Id.* at 16a, 36a.

On September 6, 1988, OSM denied petitioner's final proposed permit revision on the ground that the agency could not make findings, required by SMCRA, that the application was complete and accurate or that reclamation could be accomplished as required by the Act and the Tennessee Federal Program. Pet. App. 36a, 75a, 79a. Petitioner pursued administrative remedies, but OSM's denial of the permit revision application was sustained both by the administrative law judge (ALJ) and by the Interior Department's Board of Land Appeals (IBLA). See *id.* at 16a-17a. The ALJ found that, "[a]bsent an adequate toxic materials handling plan, * * * there was a high probability that there would be acid mine drainage into the Sewanee Conglomerate aquifer." *Id.* at 17a (internal quotation marks omitted).

5. Petitioner instituted several actions in federal district court "challenging OSM's conduct with respect to [petitioner's] mining permit, including an action seeking review of the IBLA ruling." Pet. App. 17a. The suit challenging the IBLA decision was dismissed on petitioner's motion, and most of the other claims were ultimately dismissed as well. *Ibid.* Petitioner's remaining claim, which sought $5 million in damages from the United States, was transferred to the United States Claims Court, now the Court of Federal Claims (CFC). *Id.* at 17a, 38a. After the case was transferred, petitioner filed an amended complaint in the CFC, alleging that OSM's actions had effected a taking of its property. *Ibid.*

The CFC entered judgment for the United States. Pet. App. 30a-45a. The CFC held that OSM's denial of petitioner's permit revision application was not a taking under *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), because that denial "represented an exercise of regulatory authority indistinguishable in purpose and result from that to which plaintiff was always subject under Tennessee nuisance law." Pet. App. 44a. The CFC determined that mining in the manner proposed by petitioner would create a high probability of acid mine drainage into the Sewanee aquifer that would be a public nuisance under the Tennessee Water Quality Control Act of 1977, Tenn. Code Ann. §§ 69-3-102 to 69-3-131 (1995). Pet. App. 41a-44a. In denying petitioner's motion to reconsider, the court further concluded that activities that cause the pollution of domestic waters have long been recognized by the courts of Tennessee to be contrary to public health and safety and enjoinable as a common-law nuisance. *Id.* at 28a-29a.

6. The court of appeals affirmed. Pet. App. 11a-21a. The court of appeals explained that it "need not reach the question whether [petitioner's] mining activities would have been prohibited by Tennessee nuisance law" because petitioner's takings claim failed on other grounds. *Id.* at 19a.

a. The court of appeals first held that petitioner could not establish a "categorical" taking—*i.e.*, a deprivation of all economically viable use of its leases—because petitioner had earned a $500,000 profit (on an initial investment of $33,500) on the coal that OSM had permitted it to mine. Pet. App. 19a-23a. The court rejected petitioner's contention that its inability to mine coal after September 1988 subjected it to a categorical taking of the portion of its leasehold interest that remained at that time. *Id.* at 20a-22a. The court explained that

> [b]y focusing on its inability to mine any coal under its permit after September 1988, [petitioner] ignores the fact that it was allowed to extract a substantial amount of coal under its mining permit prior to that date. If the permit had provided at the outset that [petitioner] could mine 35,700 tons of coal on the 89 acres that were covered by its permit, it would not be accurate to characterize the regulatory restraint as categorical. The analysis is not different simply because OSM imposed a condition on the permit during the course of [petitioner's] mining activities that had the effect of preventing [petitioner] from extracting any more than the 35,700 tons it had already mined.

Id. at 21a. The court concluded that "the impact of OSM's action must be measured, at [a] minimum, by the entire coal reserve covered by the permit, not the

portion that remained at the time [petitioner] was forced to stop mining." *Ibid.* It found that "[w]hile the $500,000 in profit that [petitioner] earned on the extracted coal was far less than it hoped to earn from the coal leases, the sum was considerably more than the $33,500 that [petitioner] invested in the leases," and that it was consequently "not appropriate to characterize OSM's restraints as a prohibition of all economically viable use of the property in question." *Id.* at 22a (internal quotation marks omitted).

b. The court of appeals further held that petitioner lacked reasonable investment-backed expectations that it would be allowed to conduct coal-mining operations free from the restraints imposed by OSM. Pet. App. 23a-27a. The court observed that SMCRA was enacted eight years before petitioner purchased its leases and that the statute clearly requires permittees to take steps necessary to "avoid" acid mine drainage. *Id.* at 23a. The court also found that, "having forgone its challenge to OSM's administrative actions, [petitioner] is not free to renew its challenge to those actions under the cover of a takings claim." *Id.* at 27a. The court concluded that

> [o]n the facts of this case, the consequence of assuming the lawfulness of OSM's actions, i.e., that OSM was correct in concluding that [petitioner's] mining activities constituted an unacceptable threat of acid mine drainage and the consequent pollution of groundwater in the area surrounding the mine operations, is to limit the issue before us to whether prohibiting [petitioner] from mining under those circumstances constitutes a taking. And on that issue, * * * the absence of a reasonable investment-backed expectation on [petitioner's]

> part that it would be permitted to mine while producing acid mine discharge in violation of SMCRA defeats its takings claim.

Id. at 27a.

c. The court of appeals subsequently denied petitioner's request for rehearing. Pet. App. 1a-10a, 134a. The court held that this Court's intervening decision in *Palazzolo* v. *Rhode Island*, 533 U.S. 606 (2001), did not undermine the judgment or the analysis of the earlier panel opinion. Pet. App. 2a. The court observed that "[a]s to whether the claimed 91 percent reduction in the amount of coal [petitioner] has been allowed to mine constitutes a categorical taking of [petitioner's] property under its coal leases, [*Palazzolo*] is distinctly unhelpful to [petitioner]." *Id.* at 3a. The court explained that in *Palazzolo*, this Court found no categorical taking even though "the value remaining in the property * * * was only about six percent of the value that [the plaintiff] expected to derive from the project." *Ibid.*

The court of appeals reaffirmed that the pre-existing regulatory regime established by SMCRA was relevant in adjudicating petitioner's takings claim. Pet. App. 5a-8a. The court recognized that *Palazzolo* had rejected a blanket rule that persons who purchase property with notice of existing use limitations can never establish a takings claim. *Id.* at 5a. The court held, however, that "[i]n rejecting such a 'blanket rule,' * * * the Court did not suggest that the reasonable expectations of persons in a highly regulated industry are not relevant to determining whether particular regulatory action constitutes a taking." *Ibid.* The court observed that "reasonable investment-backed expectations are an especially important consideration in the takings cal-

culus" when, as here, the claimant does business in a highly regulated industry. *Id.* at 7a.

The court then examined the other factors set forth in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978), for determining when a regulatory action goes "too far" and constitutes a taking, and concluded that petitioner's claim failed when all the factors were considered. Pet. App. 8a-9a. Finally, the court reaffirmed its rejection of petitioner's claim that it had been unfairly singled out for disparate treatment. *Id.* at 9a-10a. The court found "no basis" for that claim, which petitioner had unsuccessfully asserted during the administrative proceedings and had then voluntarily abandoned in the district court. *Id.* at 10a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Petitioner contends (Pet. 17-19) that it is entitled to compensation for a "categorical" taking of the coal that remained unmined at the time OSM denied petitioner's application for a permit revision. That argument lacks merit. If petitioner had initially been granted permission to mine 35,700 tons of coal, it could not plausibly claim to have suffered a categorical taking of its leasehold interest. As the court of appeals correctly recognized, it would be

> artificial to divide the interests in the coal lease in the way that [petitioner] propose[d because r]egulatory action that limits a coal lease owner to removing only 10 percent of the available coal at the outset cannot be meaningfully distinguished from a course of regulatory action that initially permits

> unrestricted mining but then, after 10 percent of the coal has been removed, prohibits the owner from taking the remaining 90 percent.

Pet. App. 4a; see *id.* at 21a-22a. That is particularly so in light of the fact that OSM's suspension of petitioner's permit, and its subsequent denial of petitioner's application for a permit revision, were based on *new* evidence regarding the potential deleterious consequences of petitioner's mining activities.

The court of appeals correctly found that, for purposes of "categorical" takings analysis, it was appropriate "to look at the extent to which [petitioner] was able to exploit its leases throughout the permitting period." Pet. App. 21a. Because petitioner was allowed to mine sufficient coal (at least nine percent of the coal in its leases) to earn a $500,000 profit on its $33,500 investment, OSM's regulatory actions taken as a whole did not deprive petitioner's leasehold interest of all economic value. *Id.* at 4-5a, 22a. That conclusion is fully consistent with this Court's holdings that, for purposes of determining whether a regulatory action works a categorical taking, a parcel cannot be divided into the portion taken and the portion left intact. See *Concrete Pipe & Prods.* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 643-644 (1993); *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 498-499 (1987). This Court recently reaffirmed that "in the analysis of regulatory takings claims, * * * [the Court] must focus on 'the parcel as a whole.'" *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Regional Planning Agency*, 122 S. Ct. 1465, 1481 (2002).

2. Petitioner acknowledges that in a regulatory takings case that does not involve a categorical taking, "the degree of interference with the owner's reasonable

investment backed expectations is relevant." Pet. 19; see *Tahoe-Sierra Pres. Council*, 122 S. Ct. at 1486 (discussing with approval Justice O'Connor's concurring opinion in *Palazzolo*, 533 U.S. at 636, which stated that "[the Court's] holding does not mean that the timing of the regulation's enactment relative to the acquisition of title is immaterial to the *Penn Central* analysis," and that "interference with investment-backed expectations is one of a number of factors that a court must examine"). Petitioner contends (Pet. 20), however, that the court of appeals "has given investment[-backed] expectations an unduly important role." That argument lacks merit.

In its initial opinion, the court of appeals suggested that a regulatory takings plaintiff must always show either a categorical taking or an interference with reasonable investment-backed expectations. Pet. App. 23a. In its opinion denying rehearing, however, the court discussed *all* of the factors identified in *Penn Central* and concluded that none of them supported petitioner's takings claim. Thus, with respect to "[t]he economic impact of the regulation on the claimant," *Penn Central*, 438 U.S. at 124, the court held that OSM's regulatory action "did not deprive [petitioner] of its opportunity to make a profit on the leases; it simply reduced the margin of profit that [petitioner] had hoped to achieve." Pet. App. 8a. The court noted that "the coal that [petitioner] was able to mine resulted in a substantial profit for its investors in light of the price paid for the coal lease," *ibid.*—an observation that went well beyond a holding that federal regulation had not deprived the leases of all economically beneficial use. "With respect to the nature of the governmental action," the court explained that "the revocation of the permit * * * was an exercise of the police power

directed at protecting the safety, health, and welfare of the communities surrounding [petitioner's] mine site by preventing harmful runoff." *Id.* at 9a; cf. *Penn Central*, 438 U.S. at 124 ("A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.") (citation omitted). The court of appeals' analysis on denial of rehearing refutes petitioner's suggestion that the court treated the lack of interference with reasonable investment-backed expectations as dispositive of petitioner's takings claim.*

Petitioner also contends (Pet. 20) that the court of appeals adopted a per se rule that, "once a statute is passed, anything goes, and a plaintiff's expectations become unreasonable even if the prohibition is unforeseeable, prohibitively expensive, and discriminatory." In fact, the court of appeals identified several factors other than the prior existence of the regulatory scheme that helped to demonstrate petitioner's lack of reasonable investment-backed expectations. The court noted that an entity engaged in a highly regulated activity

---

* Petitioner's reliance (Pet. 19-20) on *Hodel* v. *Irving*, 481 U.S. 704 (1987), and *Babbitt* v. *Youpee*, 519 U.S. 234 (1997), is therefore misplaced. Those decisions held that severe restrictions on the right to devise fractional interests in land effected a taking, despite the lack of proof that the restrictions substantially interfered with the landowners' investment-backed expectations. See *Irving*, 481 U.S. at 713-718; *Youpee*, 519 U.S. at 243-245. Those rulings, however, "rested primarily on the 'extraordinary' character of the governmental regulation." *Id.* at 244. By contrast, coal mining is a "highly regulated industry," Pet. App. 7a, and mining operations are routinely subject to restrictions designed to protect the public health and safety.

such as coal mining "necessarily understands that it can expect the regulatory regime to impose some restraints on its right to mine coal under a coal lease." Pet. App. 7a. The court also observed that "[t]he leases themselves notified [petitioner] of the uncertainty of obtaining permits to mine, and the low price that [petitioner] paid for the leases may well reflect the widely understood risk that [petitioner] would not be permitted to extract as much coal as it hoped from the leased properties." *Ibid.* The court noted that the likelihood of restrictions is particularly high with respect to activities that have serious adverse environmental effects, such as runoff from mining operations, "which have long been regarded as proper subjects for the exercise of the state's police power." *Id.* at 8a.

As the court of appeals correctly held, petitioner's failure to seek judicial review of the agency's administrative rulings required that the takings claim be litigated on the assumption that petitioner's proposed mining operations "constituted an unacceptable threat of acid mine drainage and the consequent pollution of groundwater in the area surrounding the mine operations." Pet. App. 27a; see pp. 16-17, *infra*. On that assumption, application of SMCRA to bar the proposed mining activities can scarcely be characterized as "unforeseeable" (Pet. 20).

3. Petitioner's contention (Pet. 21-24) that the court of appeals erred in declining to consider its claims of discriminatory and otherwise unfair treatment in the administrative process is likewise without merit. As the court explained, "in a takings case we assume that the underlying governmental action was lawful * * *. [Petitioner's] complaints about the wrongfulness of the permit denial are therefore not properly presented in the context of its takings claim." Pet. App. 10a; see *id.*

at 27a ("having forgone its challenge to OSM's administrative actions, [petitioner] is not free to renew its challenge to those actions under the cover of a takings claim in the [CFC]").

Allowing petitioner to contest the legality of OSM's actions within the context of a takings suit would disrupt the operation of the review mechanisms established by Congress. First, "[t]he question whether OSM violated SMCRA by its ruling on a permit application in a particular case was assigned by Congress to the administrative process within the Department of the Interior, subject to judicial review in a district court." Pet. App. 26a. Permitting that issue to be raised in a takings action filed in the CFC would negate Congress's determination regarding the appropriate administrative and judicial fora for resolution of such challenges. Second, if OSM had in fact acted unlawfully in suspending petitioner's permit and/or in denying its application for a permit revision, the proper relief would be to set aside the agency decision, not to leave that decision intact while requiring the United States to pay a monetary award. Petitioner cites no authority to support its contention that it is entitled to assert the purported illegality of OSM's conduct as a basis for a takings claim.

4. Petitioner contends (Pet. 24-26) that the court of appeals erred in applying the *Penn Central* factors and in concluding that the denial of the permit revision did not constitute a compensable, non-categorical taking. The court of appeals' analysis of those factors, however, is fully consistent with the precedents of this Court. In concluding that the economic impact of the regulation was not sufficient to constitute a compensable taking, the court of appeals relied (Pet. App. 8a-9a) on *Keystone Bituminous Coal Ass'n*, 480 U.S. at 485, in which

this Court held that no compensable taking had occurred where the regulation at issue did not preclude the regulated party from profitably engaging in its business. The court of appeals observed that petitioner was able to make a substantial profit for its investors in relation to the price paid for the leases. Pet. App. 8a. With respect to the character of the government action, the court of appeals explained that the revocation of the permit was an exercise of the police power directed at protecting the health and welfare of communities surrounding the mine site from the serious consequences of acid mine drainage, and was therefore "the type of governmental action that has typically been regarded as not requiring compensation for the burdens it imposes on private parties who are affected by the regulations." *Id.* at 9a (citing *Keystone Bituminous Coal Ass'n*, 480 U.S. at 488-492; *Agins* v. *Tiburon*, 447 U.S. 255, 260 (1980); *Penn Central*, 438 U.S. at 127). The court of appeals' application of established legal principles to the facts of this case is correct and does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

THOMAS L. SANSONETTI
Assistant Attorney General

WILLIAM B. LAZARUS
JOHN A. BRYSON
KATHERINE J. BARTON
Attorneys

MAY 2002